Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1998

THE MOST REVEREND BERNARD W. SCHMITT,
Bishop of the Roman Catholic Diocese
of Wheeling-Charleston,

*Petitioner,*

v.

THE CITY OF HUNTINGTON, WEST VIRGINIA,
a municipal corporation,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court of Appeals of West Virginia, as a state court of competent jurisdiction, erred in not following the holding of this Court in *Howlett v. Rose*, 496 U.S. 356 (1990) by not hearing and determining issues presented to it that arose under the U.S. Constitution.

2. Whether the Supreme Court of Appeals of West Virginia erred in not following the holding of the U.S. Court of Appeals for the Fourth Circuit in *Folio v. City of Clarksburg*, 134 F.3d 1211 (4th Cir. 1998) and *United States v. City of Huntington*, 999 F.2d 71 (1993), *cert. denied*, 510 U.S. 1109 (1994) that, for purposes of federal law, the Fire Services Fee imposed by the City of Huntington, West Virginia on all owners of real property within the City is a tax.

3. Whether the Supreme Court of Appeals of West Virginia erred in disregarding this Court's decision in *Allegheny Pittsburgh Coal Co. v. Webster County, West Virginia*, 488 U.S. 336 (1989) in not holding that the City of Huntington violated the Equal Protection Clause of the Fourteenth Amendment by attempting to assess a property tax against the Diocese where the federal government was not obligated to pay the tax and the applicable state statute, W. Va. Code Section 11-3-9, placed both the Diocese and the federal government in the same class of property owners wholly exempt from taxation on property.

4. Whether the Supreme Court of Appeals of West Virginia erred in disregarding this Court's decision in

**QUESTIONS PRESENTED FOR REVIEW** – Continued

*Allegheny Pittsburgh Coal Co. v. Webster County, West Virginia*, 488 U.S. 336 (1989) in not holding that the City of Huntington violated the Equal Protection Clause of the Fourteenth Amendment by disregarding Article X, Section 1 of the West Virginia Constitution and levying a tax on property on bases other than assessed valuation.

## LIST OF PARTIES BELOW

The following persons or entities were parties to the actions reviewed by the Supreme Court of Appeals of West Virginia in *City of Clarksburg v. Grandeotto, Inc.*, ___ W. Va. ___, ___ S.E.2d ___ (1998):

Wheeling College, Inc., a West Virginia corporation

The Most Reverend Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston

Ohio County, West Virginia Board of Education

City of Wheeling, West Virginia, a municipal corporation

City of Huntington, West Virginia, a municipal corporation

City of Clarksburg, West Virginia, a municipal corporation

Mid-City Land Company

Grandeotto, Inc.

Bernard J. and Kathy A. Folio

Bernard J. Folio d/b/a Highrise Associates

Kathryn Folio

Joseph Folio

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## OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia in *City of Clarksburg v. Grandeotto, Inc.* is not yet reported in either the West Virginia Reports or West's Southeastern Reporter, Second Series. It is available online on WESTLAW at 1998 WL 874967 and is reprinted below at Appendix at 1-19. That court's order denying the Petitioners' petition for rehearing is also not generally reported and is reproduced at Appendix at 31-32.

The relevant opinion and orders of the Circuit Court of Cabell County, West Virginia are unreported. That Court's June 4, 1998 Order granting judgment on liability in favor of the City of Huntington and denying Bishop Schmitt's motion for summary judgment is reprinted at Appendix at 20-26. Its June 12, 1998 Order entering judgment for the City is reprinted at Appendix at 27-30.

## STATEMENT OF JURISDICTION

The Petitioner seeks a writ of certiorari to the Supreme Court of Appeals of West Virginia for review of the December 14, 1989 decision of that court in *City of Clarksburg v. Grandeotto, Inc.*, ___ W. Va. ___, ___ S.E.2d ___ (1998).[1] That court denied the Bishop's petition for rehearing on January 28, 1999.

The jurisdiction of this court arises under 28 U.S.C. § 1257.

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[1] Simultaneously with the filing of this Petition, the Bishop and the other parties to a similar challenge to the validity of the City of Wheeling's Fire Services Fee are petitioning this Court for a writ of certiorari seeking review of this same decision, which also affirmed a judgment in favor of the City of Wheeling.

## CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

U.S. CONSTITUTION, ARTICLE VI:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONSTITUTION, AMENDMENT XIV, SECTION 1:

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WEST VIRGINIA CODE, SECTION 8-13-13:

**§ 8-13-13 Special charges for municipal services.**

Notwithstanding any charter provisions to the contrary, every municipality which furnishes any essential or special municipal services, including, but not limited to, police and fire protection, parking facilities on the streets or otherwise, parks and recreational facilities, street cleaning, street lighting, street maintenance and improvement, sewerage and sewage disposal, and the collection and disposal of garbage, refuse, waste, ashes, trash and

other similar matter, shall have plenary power and authority to provide by ordinance for the installation, continuance, maintenance or improvement of such service, to make reasonable regulations with respect thereto, and to impose by ordinance upon the users of such service reasonable rates, fees and charges to sewerage and sewage disposal service and any service incident to the collection and disposal of garbage, refuse, waste, ashes, trash and any other similar matter shall be subject to the provision of chapter twenty-four [§ 24-1-1 *et seq.*], of this code. The municipality shall not, however, have a lien on any property as security for payments due under such ordinance. . . .

WEST VIRGINIA CODE, SECTION 11-3-9 (superseded):

All property, real and personal described in this section, and to the extent herein limited, shall be exempt from taxation, that is to say: Property belonging to the United States, other than property permitted by the United States to be taxed under state law; . . . property belonging to, or held in trust for, colleges, seminaries, academies and free schools, if used for educational, literary or scientific purposes, including books, apparatus, annuities and furniture; property belonging to, or held in trust for, colleges or universities located in West Virginia, or any public or private nonprofit foundation or corporation which receives contributions exclusively for such college or university, if the property or dividends, interest, rents or royalties derived therefrom are used or devoted to educational purposes of such college or university; . . . all real estate not exceeding one-half acre in extent, and the buildings thereon, and used exclusively by any college or university society as a literary hall, or

as a dormitory or clubroom, if not leased or otherwise used with a view to profit;. . . .

WEST VIRGINIA CODE SECTION 11-3-9 (as amended):

**§ 11-3-9. Property exempt from taxation.**

(a) All property, real and personal described in this subsection, and to the extent herein limited, is exempt from taxation:

(1) Property belonging to the United States, other than property permitted by the United States to be taxed under state law;

* * *

(9) Property belonging to, or held in trust for, colleges, seminaries, academies and free schools, if used for educational, literary or scientific purposes, including books, apparatus, annuities and furniture;

(10) Property belonging to, or held in trust for, colleges or universities located in West Virginia, or any public or private nonprofit foundation or corporation which receives contributions exclusively for such college or university, if the property or dividends, interest, rents or royalties derived therefrom are used or devoted to educational purposes of such college or university;

* * *

CODIFIED ORDINANCES OF THE CITY OF HUNTINGTON

**§ 773.02**

For the purposes of this article, "user of municipal services" and "user" refers to any person, firm, corporation or governmental entity of any kind owning any building or structure, whether residential, commercial, governmental or otherwise, within the limits

of the City which benefits from fire and/or flood protection services provided by the City.

§ 773.03

On or after July 1, 1991, there is hereby imposed upon all users of municipal services a municipal service fee for each lot or parcel of land containing any building or structure owned by each user. The fee shall be imposed at an annual rate of eighty ($80.00) dollars per lot plus $0.0575 per square foot of each building or structure existing on each such lot.

## STATEMENT OF THE CASE

### A. Factual Background

#### 1. The Parties

The Diocese is exempt from federal taxes under section 501(c)(3) of the internal Revenue Code, 26 U.S.C. § 501(c)(3). Among its many activities throughout the State, the Diocese operates two schools within the City. The Diocese owns the real estate on which these schools sit.

The City of Huntington (the "City") is a municipal corporation organized pursuant to Chapter 8 of the West Virginia Code, W. Va. Code §§ 8-1-1 *et seq.*

#### 2. West Virginia's Statutory Exemption From Taxation

Since its creation in 1863, the State of West Virginia has continuously recognized an exemption from taxation for certain types of real and personal property, including property held by independent and public not-for-profit educational institutions that is used for educational purposes. This exemption applies to all non-federal taxes, whether levied by the State itself, by counties or by

municipal corporations. The current statutory exemption is authorized by Article X, Section 1 of the West Virginia Constitution and is codified at section 11-3-9 of the West Virginia Code.[2]

As the Bishop and the City agree, the Diocese is exempt under this section from any taxes levied by the City. There is also no dispute that this section is a lawful exercise of the Legislature's power under the West Virginia Constitution.

### 3. The City of Huntington's Assessment for Fire Services

The City nominally assesses a Fire Services Fee (the "Service Fee") on all real property in the City. *See* City of Huntington Ordinance § 773.07 (assessing a Service Fee against each "user" of real property); *id.* at § 773.02 (defining "user" as any owner of a structure within the City). The Service Fee is assessed as a flat fee on each lot and an additional amount for each square foot of floor space in any building or buildings erected on the lot. *See City of Huntington v. Bacon*, 196 W. Va. 457, 473 S.E.2d 743, 747 (1996).

Although all property owners in the City are theoretically subject to the Service Fee, the City's practice in collecting the Service Fee has been very different. The City does not bill or otherwise attempt to collect the

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[2] The West Virginia legislature amended W. Va. Code § 11-3-9 in 1998, while this action was pending before the Circuit Court of Cabell County, West Virginia. Nothing in the language of this amendment would appear to affect the resolution of this action, and the City has never argued that it would do so. For the convenience of this Court, both the prior and amended versions of this section are set forth above.

Service Fee from the federal government for any of the property that the federal government owns within the City. *See United States v. City of Huntington*, 999 F.2d 71 (4th Cir. 1993) (holding that City was barred by Supremacy Clause of U.S. Constitution from collecting service fee from federal government), *cert. denied*, 410 U.S. 1109 (1994). In addition, the City does not assess or otherwise collect the Service Fee on the property it owns.

## B. Procedural History

### 1. Proceedings in the Circuit Court of Cabell County, West Virginia

The City commenced its action against the Bishop in the Circuit Court of Cabell County, West Virginia (the "Circuit Court") in 1997. It sought payment of the Service Fee assessed against the Diocese's two schools in the City between May 1, 1992 and April 24, 1997. The Bishop moved for summary judgment, arguing in part that this Court had conclusively determined in *Bacon* that the Service Fee as in force prior to June 1994 was a tax pursuant to § 11-3-9. The Bishop further argued that, because the West Virginia Legislature had exempted the Diocese from taxes *in the same manner and to the same extent* that it had exempted the federal government, the City's efforts to collect the Service Fee from the Diocese while foregoing any effort to collect it from the federal government violated the Diocese's rights under the Equal Protection Clause of the U.S. Constitution. He argued that, because federal law rules of decision clearly indicated that the Service Fee was a tax, and because the current enforcement scheme would never equalize the amount that the

Diocese paid with the amounts that the federal government paid on similar properties, the Service Fee could not validly be applied to the Diocese.

The Circuit Court granted the Bishop's motion on July 21, 1997 with regard to the pre-June 1994 Service Fee. However, it deferred a ruling on the remaining issues raised by that motion.

The Circuit Court ruled against the Bishop and in favor of the City on the remaining issues in June 1998. It acknowledged that the City did not actually collect the Service Fee from the federal government or from itself and further recognized that the ordinance establishing the Service Fee did not recognize any exceptions for those property owners. However, the court reasoned, this uneven enforcement of the Service Fee was excused under the Supremacy Clause of the U.S. Constitution and by the City's contribution of "additional funds" to provide the covered services. Appendix at 23-24. Therefore, the Circuit Court concluded, the City's practice did not violate the Equal Protection Clause.

### 2. Petition for Appeal to the Supreme Court of Appeals of West Virginia

On October 6, 1998, the Bishop petitioned the Supreme Court of Appeals of West Virginia (the "Supreme Court of Appeals") for appeal of the Circuit Court's judgment. He offered only one assignment of error:

> The court below erred in failing to hold that the City's application of the municipal service fee to property owned by the Diocese, but not to property owned by the federal government, violated the Diocese's rights under the Equal Protection Clause of the U.S. Constitution.

By Order of October 15, 1998, the Supreme Court of Appeals granted the petition and consolidated this appeal with *Wheeling College, Inc., et al. v. City of Wheeling,* in which the Bishop, Wheeling Jesuit University and the Ohio County Board of Education sought review of a decision of the Circuit Court of Ohio County, West Virginia that presented a similar issue. The court consolidated these cases for argument with *City of Clarksburg v. Grandeotto, Inc.*,[3] which had previously scheduled for argument on November 10, 1998, and issued an expedited briefing schedule under which the petition for appeal was to be treated as a brief on the merits. The City filed its brief by the court's deadline.

The Bishop and the other parties to the Ohio County action filed a consolidated Reply Brief on November 6, 1998. In that brief, they took care to note that, because the questions that the Supreme Court of Appeals had agreed to consider involved issues arising under federal law, the *Bacon* decision alone could not be determinative of the appeal. The Bishop further restated his argument that Huntington's practice, even if authorized by state law, violated the Equal Protection Clause.

### 3. The Decision of the Supreme Court of Appeals

On December 14, 1998, the Supreme Court of Appeals issued a *per curiam* decision affirming the decisions below. Appendix at 1-15. The *per curiam* opinion

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[3] *Although City of Clarksburg v. Grandeotto, Inc.* also involved challenges under state law and the Equal Protection Clause to a "municipal service fee" purportedly enacted pursuant to W. Va. Code § 8-13-13, all of the landowners in that case were either for-profit corporations or natural persons.

ignored the Bishop's arguments and looked no further than the syllabus points of the court's state-law-based decision in *Bacon*. The opinion noted that *Bacon* had distinguished *United States v. City of Huntington*, 999 F.2d at 73, in which the Fourth Circuit had held that Huntington could not collect the Service Fee on property owned by the federal government, from the facts before it on the basis that "a federal right is not involved." Appendix at 13-14 (citing *Bacon*, 473 S.E.2d at 750-51). It added, "The Fourth Circuit's holding did not apply to the Bacons or to the Board of Education. The same is true for the appellants in the case *sub judice*." Appendix at 14. The court then restated syllabus points from *Bacon* but offered no new reasoning in support of its decision. Appendix at 14-15.

Two justices on the five-member court dissented. They stated that they would find that the City's practices violated the Equal Protection Clause:

> [I]f the federal government is immune from paying a "fee," the other entities listed in W. Va. Code § 11-3-9 are also. To say otherwise is a clear denial of equal protection to the churches and schools. Sadly, their recourse must now be to the federal courts to set things right. Accordingly, I would find that W. Va. Code § 11-3-9 exempts the Diocese and the schools from paying the "fees" at issue. . . . By holding to the contrary, the majority opinion opens the door to additional taxes and an increasing burden on those institutions that are, under our Constitution and by law, exempt from such taxation.

Appendix at 19 (Maynard, J., dissenting).

**4. Motion for Reconsideration**

The Bishop filed a Petition for Rehearing with the Supreme Court of Appeals on January 13, 1999.[4] The Bishop submitted that the Supreme Court of Appeals had erred in overlooking and not resolving their assignments of error arising under the U.S. Constitution. He expressly pointed to parallels between this decision and the posture in which this Court reversed the decision of the Supreme Court of Appeals in *Allegheny Pittsburgh Coal Co. v. County Commissioners of Webster County, West Virginia*, 488 U.S. 336 (1989). He further submitted that the court had erred in not concluding that the City's scheme of taxing them while treating the federal government as exempt from the Service Fee violated their right to equal protection.

The Supreme Court of Appeals denied the petition for rehearing on January 28, 1999. *See* Appendix at 31-32. Although one of the justices who dissented from the Supreme Court of Appeals' initial decision had left the court in the interim, the court denied the petition for rehearing by a similar three-to-two vote. Appendix at 32.

## REASONS FOR GRANTING THE WRIT

The circumstances under which this Court will grant a petition for writ of certiorari are set out in Rule 11 of this Court's Rules:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although

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[4] The Bishop and the other appellants in the Ohio County action joined in the Petition for Rehearing with regard to the Supreme Court of Appeals' affirmance of that decision.

> neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> * * *
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> * * *

In arriving at its decision in this matter, the Supreme Court of Appeals erred in respects that would support review under both of these criteria. The court ignored the command of this Court in decisions such as *Howlett v. Rose*, 496 U.S. 356, 369 (1990) and *Felder v. Casey*, 487 U.S. 131 (1988) that a state court of competent jurisdiction must hear and consider issues presented to it that arise under federal law. To the extent, if any, that the court silently addressed the Bishop's federal-law claims and defenses, it decided that, contrary to the holdings of the U.S. Court of Appeals for the Fourth Circuit in *Folio v. City of Clarksburg*, 134 F.3d 1211 (4th Cir. 1998) and *United States v. City of Huntington*, 999 F.2d at 73, a "municipal services fee" imposed on all owners of real property without regard to the value of that property was a tax, rather than a service fee, for purposes of federal law. In the same manner, the Supreme Court of Appeals ignored the holding of this Court in *Allegheny Pittsburgh Coal Co. v. County Commissioners of Webster County, West Virginia*, 488 U.S. 336 (1989) that, where a state's law directs that

all taxes upon property are to be assessed on the basis of assessed value, the taxation of property on some other basis that results in long-term and significant disparities in the amount paid violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. For these reasons, this Court should grant this petition and, on full review, reverse the decision of the Supreme Court of Appeals.

### A. In Not Addressing and Resolving the Bishop's Assignment of Error Arising Under the U.S. Constitution, the Supreme Court of Appeals Overlooked the Clear Teachings of this Court.

Just as federal courts must often apply rules of decision provided by state law, *see Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Supremacy Clause of the U.S. Constitution requires state courts to apply federal law wherever appropriate:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art VI; *see also Public Service Comm'n of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 247-48 (1952) ("State courts are bound equally with the federal courts by the Federal Constitution and laws.").[5]

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[5] The Supreme Court of Appeals has itself previously recognized the supremacy of federal law and its obligation to adhere to that law. *See, e.g., Arbogast v. Arbogast*, 174 W. Va. 498,

The Supreme Court of Appeals therefore had "a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.' " *Felder*, 487 U.S. at 151 (quoting *Garrett v. Moore-McCormack, Co.*, 317 U.S. 239, 245, 63 S.Ct. 246, 251 (1942)). In the absence of a "valid excuse," a state court of competent jurisdiction must consider the federal claims put before it. *Howlett*, 496 U.S. at 369-70.

The Supreme Court of Appeals erred in its failure to consider the Bishop's federal constitutional claims. The State of West Virginia has clearly vested the Supreme Court of Appeals with jurisdiction to consider challenges to the validity, both facially and as applied, of municipal taxes and user fees. *See* W. Va. Const. art. VIII, § 3 (setting forth that Supreme Court of Appeals "shall have appellate jurisdiction in civil cases at law where the matter in controversy, exclusive of interest and costs, is of greater value or amount than three hundred dollars"); W. Va. Code § 51-1-3 (authorizing Supreme Court of Appeals to exercise appellate jurisdiction over civil cases in which, *inter alia*, amount in controversy is greater than or equal to one hundred dollars, a party challenges the right of a county to levy a toll or tax or a party challenges the constitutionality of a law). Consistent with this jurisdiction, the Supreme Court of Appeals has previously heard and determined tax issues. *See, e.g., Bacon*, 473 S.E.2d at 748-49 (considering both circuit court's grant of summary

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327 S.E.2d 675, 679 (1984) (recognizing that the federal Parental Kidnapping Prevention Act "establishes a policy of federal preemption in enforcement of out-of-state custody disputes which, under the Supremacy Clause, takes precedence over state law and must be consulted first in determining whether the Kansas decree is entitled to enforcement here." (footnote omitted)).

judgment and question certified by circuit court on validity of charge denominated as "municipal service fee"); *Central Realty Co. v. Martin*, 126 W. Va. 915, 30 S.E.2d 720, 722 (1944) (reviewing circuit court's determination under W. Va. Code § 11-3-9 that property held in trust for benevolent association was exempt from property taxes). It has also heard federal-law challenges to taxes imposed under the state's authority. *See, e.g., Capitol Cablevision Corp. v. Hardesty*, 168 W. Va. 631, 285 S.E.2d 412 (1981) (considering challenges to business and occupation tax under Commerce and Equal Protection Clauses of U.S. Constitution). Therefore, the Supreme Court was required to consider the Bishop's federal claims and to apply federal law to them.[6]

Although this Court acknowledged in *Howlett*, 496 U.S. at 369, that a state court might have a "valid excuse" not to consider a federal claim, no such excuse can be found here. To date, the only excuses that this Court has considered and deemed to be valid have involved "neutral rule[s] of judicial administration." *Id.* at 374.[7] The Supreme Court of Appeals never explained its failure to consider the federal issue. It did not decide the state-law

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[6] This duty of the state courts to hear and decide these federal constitutional issues is particularly strong here, as the federal courts have construed the Tax Injunction Act, 28 U.S.C. § 1341, to require these claims to be presented in the first instance to state – rather than federal – courts. *See, e.g., Folio*, 134 F.3d at 1214.

[7] Moreover, none of the three cases in which the *Howlett* Court acknowledged that neutral rules of judicial administration had precluded consideration of federal claims were decided on the basis of whether the plaintiffs' claims were federal in nature. Rather, the "neutral rule" in each case looked to either the residency of the parties or the locus of the events giving rise to the cause of action. *See* 496 U.S. at 374-75.

claims presented to it in *Bacon* on the basis of any question of judicial administration, or even of procedure. Instead, it resolved that appeal by exercising jurisdiction over the parties before it and determining *as a matter of the substantive law of West Virginia* that the City of Huntington's municipal service fee was a user fee and not a tax. *See generally* 473 S.E.2d at 751-54. The Bishop is not aware of any "rule of judicial administration" that might properly have precluded consideration by the court below of the federal-law challenge to the Service Fee.

The facts on which this Court reversed the state court's judgment in *Howlett* are in many respects analogous to the facts here. There, the plaintiff brought an action in Florida state court against, *inter alia*, the school district in which he had attended high school. He alleged that the defendants, including several individual school officials, had violated his rights under the Fourth and Fourteenth Amendments by searching his automobile on school property while he attended high school. He sought to recover damages under 42 U.S.C. § 1983. 496 U.S. at 359. The trial court dismissed his claim against the school district, and the intermediate appellate court affirmed. The appellate court reasoned that, because Florida had not expressly waived the statutory immunity of entities such as school boards to actions under § 1983, the petitioner's claim could not be maintained in a Florida state court. It further held that, regardless of the source of law that provided a claim against the state or its subdivision, the question of the immunity of the state and its entities to suit in its own courts was to be resolved by reference to its own law. *Id.* at 359-60. The Florida Supreme Court denied the plaintiff's petition for discretionary appeal, but this Court granted certiorari. *Id.* at 360.

On review, this Court reversed and held that, regardless of the forum, the issue of whether the school district was immune to the § 1983 claims was to be determined solely by reference to federal law. It first noted that, because of the Supremacy Clause, federal law was part of the law to be enforced in the courts of each of the states:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might well be true – but because the Constitution and laws passed pursuant to it are as much law in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. "The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."

*Id.* at 367, 110 S.Ct. at 2438 (quoting *Clafin v. Houseman*, 93 U.S. 130, 136-37 (1876)) (alteration in original). Therefore, the Court reasoned, state courts could not decline to enforce a federal right in the absence of a "valid excuse." *Id.* at 370. To be "valid," this Court added, an excuse could not be "inconsistent with or violate[ ] federal law," *i.e.*, it could not be based upon either a disagreement with

the policy expressed in federal law or in a refusal to recognize the supremacy of that law. *Id.* at 371.

This Court then concluded that the courts below had erred in finding the school board to be immune. It considered two possible interpretations of the appellate court's decision and found the decision to be infirm under either interpretation. First, this Court rejected the suggestion that the defendants might be entitled to state-created immunities over and above the immunities from § 1983 actions provided under federal law. This Court noted, "The elements of, and the defenses to, a federal cause of action are defined by federal law." It held that Florida lacked the power to overcome a settled line of federal case law under which all of the defendants were subject to suit under § 1983. *Id.* at 375-76. This Court then rejected the suggestion that Florida's sovereign immunity statute placed the plaintiff's claims outside the scope of the claims that the trial court had jurisdiction to hear. It noted that the trial court that had declined to hear the plaintiff's claim was established as a court of general jurisdiction. It added that the trial court regularly heard state-law tort claims brought by individuals against entities of the state and regularly awarded real damages. It concluded that Florida could not refuse to provide this forum to the plaintiff solely because the right he asserted was federally created. *Id.* at 378-79.

That holding cannot be reconciled with the conduct of the Supreme Court of Appeals here. Not only did the amount in controversy exceed that court's jurisdictional minimum, the West Virginia legislature also expressly authorized the court to hear appeals to the validity of taxes and appeals of constitutional issues. Again, the court offered no excuse or explanation for its failure to

consider the federal-law issues. It erred in restricting its inquiry to issues of state law.

By failing to address the Bishop's constitutional challenge to the Service Fee, the Supreme Court of Appeals has left this case in the same procedural posture in which this Court intervened in *Allegheny Pittsburgh Coal.* The taxpayers in that case, recent purchasers of land in Webster County, West Virginia, challenged the county's system of determining property assessments by almost-exclusive reference to the most recent purchase price. They contended that this practice led to long-term disparities in taxation that violated both the West Virginia Constitution and the Fourteenth Amendment's Equal Protection Clause. 488 U.S. at 339-40. In reviewing the circuit court's decision in favor of the taxpayers, the Supreme Court of Appeals acknowledged that the taxpayers' claims arose from both constitutions. *In re 1975 Tax Assessment Against Oneida Coal,* 178 W. Va. 485, 360 S.E.2d 560, 562 (1987), *rev'd sub nom. Allegheny Pittsburgh Coal Co. v. County Commissioners of Webster County, West Virginia,* 488 U.S. 336 (1989). However, its substantive analysis focused exclusively on the state constitutional issues. The court never addressed the federal claims, federal law or federal precedent. *See generally id.* at 562-65. Holding only that the county's assessment system comported with the West Virginia Constitution, the court reversed the circuit court below. *Id.* at 565.

This Court granted certiorari to consider the overlooked federal issue. *Allegheny Pittsburgh Coal,* 488 U.S. at 342 ("We granted certiorari to decide whether these Webster County tax assessments denied petitioners the equal protection of the law and, if so, whether petitioners could constitutionally be limited to the remedy of seeking to raise the assessments of others."). In addressing this

claim, this Court looked to the Equal Protection Clause of the Fourteenth Amendment and to case law construing that provision in the context of state taxation. *See id.* at 345-46. This Court held that the county's purchase-value assessment system, which had no basis in state law, resulted in exactly the sort of "systematic" disparity in assessments and taxation that violated the Equal Protection Clause. It therefore reversed the Supreme Court of Appeals and struck down the Webster County system as a matter of federal law. *Id.* at 346.

As in *Howlett* and *Allegheny Pittsburgh Coal*, the Supreme Court of Appeals has overlooked the presence of a federal-law issue here. The Bishop therefore respectfully requests that this Court accept review of the decision below.

**B. To the Extent, if Any, that the Supreme Court of Appeals Addressed the Constitutional Issues Raised by the Bishop, It Created a Conflict with the Decisions of the U.S. Court of Appeals for the Fourth Circuit by Deciding that the Service Fee is a User Fee, Rather than a Tax, for Purposes of Federal Law.**

The Bishop does not believe that the decision of the Supreme Court of Appeals addressed the federal-law aspects of their challenge to the Service Fee. Even if this Court were to conclude to the contrary, however, this Court should still grant this Petition. If the Supreme Court of Appeals did address the federal-law issues raised by the Bishop, then it could have affirmed the decision of the Circuit Court only by coming to legal conclusions on those issues that were directly contrary to the holdings of the U.S. Court of Appeals for the Fourth Circuit in two decisions handed down within the last six years. The reasoning of the Supreme Court of Appeals, if

correct, would call into question the analysis employed by numerous federal courts, including the First and Fourth Circuits, in determining whether a particular governmental levy is a user fee or a tax.

### 1. Under the Supremacy Clause, the Question of Whether the Service Fee is a "Tax" for Purposes of the Equal Protection Clause is to be Determined by Reference to Federal Law.

The Bishop has alleged throughout this action that the City's efforts to collect the Service Fee from the Diocese violates its rights under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. For purposes of federal constitutional, statutory and common law, the question of whether a particular charge is a "tax" is determined by reference to federal-law rules of decision. In *Carpenter v. Shaw*, 280 U.S. 363, 367-68 (1930), this Court looked to federal law to determine whether a state-imposed tax on oil and gas royalties was invalid as applied to the petitioner because it was inconsistent with a tax exemption granted in an Indian treaty, an area within exclusive federal purview:

> Where a federal right is concerned, we are not bound by the characterization given to a state tax by state courts or Legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.

Twice within the last six years, the Fourth Circuit has followed this rule and applied principles of federal law in determining whether "municipal service fees" assessed by West Virginia municipalities are actually user fees or are instead taxes. In *United States v. City of Huntington*,

999 F.2d at 74, the court looked to federal law in concluding that the Service Fee was a tax that, under the Supremacy Clause, could not be levied on federally owned property. In *Folio*, the same court made clear that this analytical model – and the result it produced – was not limited to questions of constitutional immunities but was instead applicable to all questions arising under federal law. The court again relied on a federal-law definition of "tax" in deciding that the Tax Injunction Act, 28 U.S.C. § 1341,[8] precluded the federal courts from considering at all whether Clarksburg's collection of its fire protection fee violated the Fourteenth Amendment's Equal Protection and Due Process Clauses. 134 F.3d at 1217.

The application of these principles here is obvious. The Equal Protection Clause establishes a federal guarantee. Therefore, the question of whether a particular assessment levied by any state or any subdivision thereof is a "tax" that violates the Equal Protection Clause is properly approached as a question of federal law.

**2. The U.S. Court of Appeals for the Fourth Circuit Has Held that a "Municipal Service Fee" Levied Against All Owners of Real Property is a Tax and not a "User Fee" for Purposes of Federal Law.**

The Fourth Circuit has held that the Service Fee is a tax for purposes of federal law. *United States v. City of Huntington*, 999 F.2d at 74. In reaching this conclusion, the court considered "all the facts and circumstances . . . and

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[8] That statute states, "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

assess[ed] them on the basis of economic realities." *Id.* at 73 (citing *United States v. City of Columbia, Missouri*, 914 F.2d 151, 154 (8th Cir. 1990)).

The Fourth Circuit repeated this conclusion in its 1998 decision in *Folio*. In holding that a similar fee enacted by the City of Clarksburg was a tax for purposes of the Tax Injunction Act, 28 U.S.C. § 1341, the court explained its analysis:

> A tax is generally a revenue-raising measure, imposed by a legislative body, that allocates revenue "to a general fund, and [is] spent for the benefit of the entire community." [*Collins Holding Corp. v. Jasper County, South Carolina*, 123 F.3d 797, 800 (4th Cir. 1997)] (quoting *San Juan Cellular Tel. Co. v. Public Serv. Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992)). A user fee, by contrast, is a "payment[ ] given in return for a government provided benefit" and is tied in some fashion to the payor's use of the service. *United States v. City of Huntington*, 999 F.2d 71, 74 (4th Cir. 1993). Generally speaking, a special assessment imposed by a municipality qualifies as a tax within the meaning of the Tax Injunction Act. *See, e.g., Burris* [*v. City of Little Rock*], 941 F.2d [717,] 720 [(8th Cir. 1991)]; *Indiana Waste Sys., Inc. v. County of Porter*, 787 F.Supp. 859, 865 (N.D. Ind. 1992) (collecting cases).

134 F.3d at 1217. The court added that it found the City of Clarksburg's levy to be indistinguishable from the Service Fee. *Id.* On the basis of that conclusion, the court affirmed the district court's determination that it had lacked jurisdiction to hear the Folios' challenge to the Clarksburg fee. *Id.* at 1211.

Therefore, to the extent that the Supreme Court of Appeals concluded that the Service Fee was a tax, its holding created a conflict with the Fourth Circuit. This

Court should resolve this conflict and enunciate standards that would prevent this problem from arising again in the future.

### C. The Supreme Court of Appeals Acted Contrary to the Teachings of this Court when it Failed to Hold that the City's Application of the Service Fee to Real Property Owned by the Diocese Violated the Diocese's Rights Under the Equal Protection Clause of the U.S. Constitution.

Although the states have broad power under the U.S. Constitution to levy taxes, that power is not unfettered. *See, e.g., Kentucky Union Co. v. Kentucky*, 219 U.S. 140, 151 (1911). The Equal Protection Clause, under which each state must guarantee "to any person within its jurisdiction the equal protection of the laws," is among the most important of these restrictions. That clause protects private parties against the imposition of taxes that, although facially neutral, are enforced in a discriminatory manner. *See, e.g., Allegheny Pittsburgh Coal Co.*, 488 U.S. at 345-46 (invalidating county property tax assessment system that "select[ed recent transferees of real property] out for discriminatory treatment by subjecting [them] to taxes not imposed on other members of the same class") (quoting *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946)).[9]

Here, the City's effort to collect the Service Fee from the Diocese fails to afford it the equal protection of West

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[9] The protection of the Equal Protection Clause extends beyond natural persons to include private entities. *See Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985) (holding that corporations are "persons" for purposes of Equal Protection Clause).

Virginia's laws. In contravention of explicit State statutory language that places the Diocese and the federal government in a single class, the City has persisted in assessing the Service Fee against the Private Plaintiffs and the Board but not against the federal government. Moreover, because the City seeks to collect the Service Fee from the Diocese on the basis of the square footage of the buildings on its property, it would violate the guarantee of Article X, Section 1 of the West Virginia Constitution that property will be taxed only in proportion to its assessed value.

Here again, the decision below is in tension with this Court's decision in *Allegheny Pittsburgh Coal*. In that case, Webster County followed a practice of fixing the assessed value of all property at fifty percent of the price for which it had last sold. Although occasional adjustments were made to the assessments of property that had not recently changed hands, these adjustments were infrequent and minimal. 488 U.S. at 338-39. As a result, the petitioners' property was assessed at from eight to thirty-five times the value of comparable adjoining lots, and the county's adjustment policy would have required over 500 years to correct the imbalance. *Id.* at 341-42. The circuit court found that this system of assessment discriminated against the petitioners in violation of both the Equal Protection Clause and the guarantees of the West Virginia Constitution. *Id.* at 339-40. As noted above, the Supreme Court of Appeals reversed that decision, and this Court granted certiorari. *Id.* at 342.

This Court reversed the decision below and held that, given the structure of West Virginia's system of taxation, the county's assessments violated the Equal Protection Clause. This Court was careful to point out that the Equal

Protection Clause could tolerate short delays in equalization of tax rates, *id.* at 343, and that the states were generally free to create reasonable classes of taxpayers and assign differing tax burdens to each of those classes, *id.* at 344. However, this Court pointed out, West Virginia law contained *nothing* that would have suggested that recent purchasers of property could be taxed any differently than persons who had owned their property for some period of time or suggested that the State's counties had the power to create such classes. *Id.* at 345. The County's assessment system, therefore, could not stand.[10]

**1. The Law of West Virginia Does Not Distinguish Between the Property Owned by the Diocese and Property Owned by Entities of the Federal Government in Any Manner That Would Allow the City to Assess the Service Fee Against One But Not the Other.**

The City's scheme for assessment of the Service Fee suffers from the same basic flaw found to be fatal in *Allegheny Pittsburgh Coal.* West Virginia has created a single class that is *entirely exempt from property taxes. See* W. Va. Code § 11-3-9. Throughout the course of this action, the Bishop and the City have agreed that the property on which the City is attempting to impose the Service Fee is within this single, exempt class of property.

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[10] The validity of *Allegheny Pittsburgh Coal* is in no way affected by this Court's decision in *Nordlinger v. Hahn*, 505 U.S. 1 (1992). In *Nordlinger*, this Court upheld Proposition 13, California's statutory acquisition-value property assessment system, as an explicit classification scheme by which the sovereign had rationally created classes of property and treated those classes differently for purposes of taxation. *Id.* at 15-16.

They have also agreed that real property owned by the federal government and its instrumentalities (principally the GSA) is within this class, as well.

The City does not treat Diocesan property and federally-owned property in the similar manner required by the Equal Protection Clause. The City admits that it does not collect the Service Fee from instrumentalities of the federal government. The reason is because the federal courts have recognized that this so-called user fee is nothing more than a disguised property tax. The effect of this determination is that similarly classified entities are treated in a dramatically opposite manner. In *Allegheny Pittsburgh Coal*, this Court rejected a tax scheme that resulted in similarly classified taxpayers paying greatly disproportionate taxes as a result of the assessment methodology. It was not enough, this Court held, for the taxing body to shrug its shoulders and stick with a flawed system. Similarly, the City cannot maintain a property tax under the guise of a service fee where the effect is to cause not just a gross, but an absolute, disparity in how similarly classified entities are treated. The City's actual practice therefore, results in precisely the same type of discrimination identified in *Allegheny County Pittsburgh Coal* and is similarly invalid under the Equal Protection Clause.[11]

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[11] Even if federal law were to lead to the conclusion that the Service Fee is a "user fee" in this context, the City's practice still could not withstand scrutiny. The *Allegheny Pittsburgh Coal* Court suggested that local governments cannot create classifications unless authorized to do so by state law. *See* 488 U.S. at 345. Section 8-13-13 of the West Virginia Code, the statutory provision that authorizes municipalities to assess user fees recognizes no classes and contains no suggestion that

Until the City creates a true service fee that meets the reasonable parameters set by the federal courts, or until the West Virginia Legislature reexamines the tax-exempt classifications that have been maintained since this state was created, the equal protection rights of the Appellants will continue to be violated.

Despite the lack of any support in a legislative system of classification, the Service Fee is assessed against some ostensibly exempted property owners but not against others. As applied to the Diocese, this system violates the Equal Protection Clause and must be struck down.

**2. The City's Levying of the Service Fee on a Basis Other than Assessed Value Violates the Equal Protection Clause in the Same Manner as the Purchase Value System Challenged in *Allegheny Pittsburgh Coal.***

The City's method of assessing the Service Fee also suffers from precisely the same flaw that this Court found to be fatal to Webster County's assessment system in *Allegheny Pittsburgh Coal.* In order to avoid the clear holdings of the Supreme Court of Appeals in cases such as *City of Fairmont v. Pitrolo Pontiac-Cadillac Co.*, 172 W. Va. 505, 308 S.E.2d 527, 529 (1983), *cert. denied*, 466 U.S. 958, 104 S.Ct. 2169 (1984) and *Hare v. City of Wheeling*, 171 W. Va. 284, 298 S.E.2d 820, 826 (1982), the City has chosen to impose the Service Fee on the basis of square footage, rather than valuation. However, Article X, Section 1 of the

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federal property should be exempt from those fees. Similarly, the City has made absolutely no effort to classify federally owned property differently from property owned by any other person or entity.

West Virginia Constitution guarantees that property in West Virginia will be taxed only on the basis of its assessed value. Moreover, as discussed above, the Service Fee must be considered a tax in evaluating whether it violates the Equal Protection Clause.

The Service Fee is therefore indistinguishable from the system of taxation that this Court invalidated in *Allegheny Pittsburgh Coal*. It taxes property, but in a manner that ignores that property's value. Property burdened with large structures that have little value and little potential to generate revenue will be taxed at a higher rate than more valuable property with smaller buildings. Moreover, so long as those structures remain on a property, the disparity between the Service Fee and the property's value will continue. The City's ordinance contains no provision for equalization over time – not even over the five hundred years that this Court held to be plainly inadequate in *Allegheny Pittsburgh Coal*. 488 U.S. at 341-42.

The implications of such a system for religious and educational entities are enormous. A tax based on square footage rather than value will burden the Diocese with huge debts arising from classroom and sanctuary space from which they cannot legally or practically produce a profit. Regardless of the City's need for revenue, the City cannot be permitted to circumvent and flout the State of West Virginia's constitutional and statutory commands in order to raise those funds.

Under this Court's decisions interpreting the Equal Protection Clause, the Service Fee cannot be permitted to stand. Therefore, if this Court determines that the decision of the Supreme Court of Appeals actually reached this issue, this Court should grant this Petition and affirm the correctness of its previous decisions.

## CONCLUSION

For the reasons stated above, the Bishop respectfully requests that this Court grant this petition, issue a writ of certiorari to the Supreme Court of Appeals and, upon review, reverse the decision below.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

September 1998 Term

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No. 25143

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CITY OF CLARKSBURG,
A MUNICIPAL CORPORATION,

Appellee

v.

GRANDEOTTO, INC., A CORPORATION;
BERNARD J. AND KATHY A. FOLIO; MID-CITY LAND
CO.; BERNARD J. FOLIO D/B/A HIGHRISE
ASSOCIATES; KATHRYN FOLIO; JOSEPH FOLIO,

Appellants

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Appeal from the Circuit Court of Harrison County
Honorable Thomas A. Bedell, Judge
Civil Action Nos. 93-C-609-2, 93-C-648-2, 93-C-706-2,
93-C-707-2, 94-C-184-1 & 94-C-196-2

(Filed Dec. 15, 1998)

AFFIRMED

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**AND**

No. 25401

THE CITY OF HUNTINGTON,
A WEST VIRGINIA CORPORATION,

Appellee

v.

MOST REVEREND BERNARD W. SCHMITT, BISHOP
OF THE ROMAN CATHOLIC DIOCESE OF
WHEELING-CHARLESTON,

Appellant

Appeal from the Circuit Court of Cabell County
Honorable David M. Pancake, Judge
Civil Action No. 97-C-320

AFFIRMED

AND

No. 25402

WHEELING COLLEGE, INC., A WEST VIRGINIA CORPORATION, AND THE MOST REVEREND BERNARD W. SCHMITT, BISHOP OF THE DIOCESE OF WHEELING-CHARLESTON,

Appellants

v.

THE CITY OF WHEELING, A MUNICIPAL CORPORATION,

Appellee

**AND**

THE CITY OF WHEELING, A MUNICIPAL CORPORATION,

Appellee

v.

THE OHIO COUNTY BOARD OF EDUCATION,

Appellant

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Appeal from the Circuit Court of Ohio County
Honorable Ronald E. Wilson, Judge
Civil Action Nos. 95-C-72W & 96-C-11

AFFIRMED

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Submitted: November 10, 1998
Filed: December 15, 1998

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The Opinion of the Court was delivered PER CURIAM.
JUSTICE McCUSKEY dissents and reserves the right to file a dissenting Opinion.
JUSTICE MAYNARD dissents and reserves the right to file a dissenting Opinion.
JUSTICE McGRAW did not participate in the decision of this case.

## SYLLABUS BY THE COURT

1. "An ordinance which imposes a municipal service fee pursuant to *W.Va. Code,* 8-13-13 [1971] upon the owners of buildings at an annual rate plus a percentage based upon the square footage of space contained in each structure on the lot for the sole purpose of defraying the cost of fire and flood protection services is a user fee rather than a tax and therefore, is not in violation of the Tax Limitation Amendment found in *W.Va. Const.* Art. X, § 1." Syllabus Point 6, *City of Huntington v. Bacon,* 196 W.Va. 457, 473 S.E.2d 743 (1996).

2. "Pursuant to *W.Va. Code,* 18-5-9 [1933], a county board of education is authorized to pay a municipal service fee imposed by a municipality for fire and flood protection services pursuant to *W.Va. Code,* 8-13-13 [1971] in order to protect the health of its pupils and in order to keep its school grounds and buildings in good order." Syllabus Point 8, *City of Huntington v. Bacon,* 196 W.Va. 457, 473 S.E.2d 743 (1996).

Per Curiam:

The three cases before us were consolidated for argument and opinion. In the first case, Grandeotto, Inc., Kathy A. Folio, Mid-City Land Co., Bernard J. Folio, d/b/a Highrise Associates, Kathryn V. Folio, and Joseph A. Folio (the Grandeottos) appeal the July 24, 1997 order of the Circuit Court of Harrison County, West Virginia, which granted summary judgment to the City of Clarksburg and ordered the Grandeottos to pay the fire service protection fee. In the second case, Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston (the Bishop or Diocese), appeals the June 12, 1998 order of the Circuit Court of Cabell County, West Virginia, which granted summary judgment to the City of Huntington and ordered the Diocese to pay the municipal service fee. In the third case, Wheeling College, Inc. (now Wheeling Jesuit University) and Bishop Schmitt (the University and the Diocese) as well as the Ohio County Board of Education (Board) appeal the August 19, 1998 order of the Circuit Court of Ohio County, West Virginia, which granted partial summary judgment to the City of Wheeling in that the court found the University, Diocese, and Board must pay the fire service fee. Other issues were reserved for further consideration.[1] That order was

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[1] The court reserved three issues for further consideration and action: the amounts owed by the University, the Diocese, and the Board; whether a binding settlement existed between the City, the University and Diocese; and whether delinquent fire service fees were owed by the Board prior to this Court's decision in *City of Huntington v. Bacon*, 196 W.Va. 457, 473 S.E.2d 743 (1996).

determined by the court to be a final, appealable order by order entered August 28, 1998.

I.

The first case involves individual landowners who own property within the City of Clarksburg. The City enacted and amended ordinances imposing fire protection and waste collection service fees under the authority of W.Va. Code § 8-13-13 (1971).[2] This Code section grants local governments authority to enact ordinances for the imposition of reasonable fees upon the users of municipal services to defray certain municipal operating costs, in this case, the costs of fire protection. Ordinance § 957.11 specifies that a flat fee is charged for fire protection services to owners of residential property; owners of

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[2] W.Va. Code § 8-13-13 (1971) states in relevant part:

Notwithstanding any charter provisions to the contrary, every municipality which furnishes any essential or special municipal service, including, but not limited to, police and fire protection, parking facilities on the streets or otherwise, parks and recreational facilities, street cleaning, street lighting, street maintenance and improvement, sewerage and sewage disposal, and the collection and disposal of garbage, refuse, waste, ashes, trash and any other similar matter, shall have plenary power and authority to provide by ordinance for the installation, continuance, maintenance or improvement of such service, to make reasonable regulations with respect thereto, and to impose by ordinance upon the users of such service reasonable rates, fees and charges to be collected in the manner specified in the ordinance: Provided, That any sewerage and sewage disposal service and any service incident to the collection and disposal of garbage, refuse, waste, ashes, trash and any other similar matter shall be subject to the provisions of chapter twenty-four [§ 24-1-1 et seq.], of this code.

nonresidential unit structures and multiple-family residential structures are assessed according to square footage; nonresidential tenants must pay fifty percent of the amount per square foot that nonresidential owners must pay. The fee generates approximately $750,000 in revenue per year, which is used to defray the costs of operating the Clarksburg Fire Department. The fee comprises approximately forty-two percent of the fire department's budget of $1,809,000.

The individual landowners refused to pay the fire protection fees assessed against their various properties. The City of Clarksburg filed actions in circuit court in an effort to collect the unpaid fire service fees. The actions were consolidated by the court. After extensive discovery, the parties made a series of dispositive motions, which were converted by the court to Rule 56 motions for summary judgment. On July 24, 1997, the court granted the City's motion for summary judgment and denied the landowners' motion for summary judgment. The court determined the amount owed by each landowner and ordered that the fees be paid. It is from this order that the landowners appeal.

II.

In the second case, the City of Huntington brought an action against the Diocese to collect unpaid municipal service fees on two buildings located within the City. The purpose of the fee is to defray the costs of providing fire and flood protection. Pursuant to W.Va. Code § 8-13-13, the City of Huntington enacted Ordinance § 773.03 and began charging a municipal service fee in July 1990. The

fee is assessed as a flat fee on each lot with an additional amount assessed for each square foot of floor space in each building erected on each lot. The fee generates approximately $4,200,000 in revenue per year, while the cost of providing fire and flood protection is approximately $6,900,000 per year. Therefore, the City must pay an additional amount of approximately $2,700,000 annually to cover the cost of these services.

In conformity with the Fourth Circuit's decision in *United States v. City of Huntington, W.Va.*, 999 F.2d 71 (4th Cir. 1993), *cert. denied*, 510 U.S. 1109, 114 S.Ct 1048, 127 L.Ed.2d 371 (1994),[3] the City does not collect the service fee from the federal government. Nor does the City bill itself for the service fee.

The City attempted to collect unpaid fees from the Bishop or Diocese for the two schools located in the City by filing an action in circuit court in 1997. Both parties moved for summary judgment. On July 21, 1997, the court granted the Bishop partial summary judgment, stating that the April 1992 through June 1994 fee actually constituted a tax which could not be levied against the Bishop. The same order granted partial summary judgment to the City, stating that "the municipal service fee for the period of July 1, 1994 through April 24, 1997 constitutes a fee, not a tax, and can be levied against the Defendant." By order entered June 4, 1998, the court

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[3] *United States v. City of Huntington, W.Va.*, 999 F.2d 71 (4th Cir. 1993), *cert. denied*, 510 U.S. 1109, 114 S.Ct. 1048, 127 L.Ed.2d 371 (1994), holds that the City is barred by the Supremacy Clause of the U.S. Constitution from collecting the service fee from the federal government.

found the Diocese was liable to the City for payment of the service fee. The exact amount owed was determined by order of court entered on June 12, 1998. It is from this order the Diocese appeals.

III.

The third appeal involves two cases which were consolidated by the circuit court. Pursuant to W.Va. Code § 8-13-13 (1971), the City of Wheeling enacted Ordinance § 793.03, the purpose of which is to defray the costs of providing fire protection services to the City of Wheeling. Owners of residential unit structures are assessed a flat annual fee; owners of nonresidential unit structures are assessed a rate based on the square footage of the building; tenants of nonresidential and residential unit structures are assessed a flat fee; owners or lessees of vehicles are assessed a flat fee per vehicle. The ordinance exempts no one from paying the fire service fee; however, the City does not issue bills to itself for buildings and vehicles titled in the name of the City.

The University and Diocese filed an action against the City seeking a declaration that the fire service fee is actually a tax from which they are exempt pursuant to W.Va. Code § 11-3-9 (1998).[4] The City instituted a

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[4] W.Va. Code § 11-3-9 (1998) states in pertinent part:

(a) All property, real and personal, described in this subsection, and to the extent herein limited, is exempt from taxation:

(1) Property belonging to the United States, other than property permitted by the United States to be taxed under state law;

collection action against the Board. The Board posited essentially the same defenses to the fire service fee that the University and Diocese raised in their action. The court, therefore, consolidated the two actions. Following discovery, the parties filed cross-motions for summary judgment. The circuit court entered an order on August 19, 1998 finding that "the Defendants are authorized to pay the fire service fee imposed by the City of Wheeling[.]" Having reserved certain issues for later consideration, the court entered an order on August 28, 1998, finding that the prior order of the court "constitutes a final, appealable Order." It is from this order the University, Diocese, and Board appeal.

## IV.

On appeal, the various appellants offer various assignments of error. The Grandeottos argue the Clarksburg fee is a tax which violates the Tax Limitation Amendment,[5] due process, and equal protection. The Diocese, University, and the Board argue they do not have to pay because the federal government is immune pursuant to *United States v. City of Huntington, W.Va., supra,* and W.Va. Code § 11-3-9 (1998)[6] exempts them from taxation along with the federal government. All

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(5) Property used exclusively for divine worship;

(9) Property belonging to, or held in trust for, colleges, seminaries, academies and free schools, if used for educational, literary or scientific purposes, including books, apparatus, annuities and furniture[.]

[5] W.Va. Const. art. X, § 1.

[6] *See supra* note 4.

parties request that we revisit our prior decision, *City of Huntington v. Bacon*, 196 W.Va. 457, 473 S.E.2d 743 (1996). The question we must answer is whether the circuit courts erred in determining the appellants must pay the municipal and fire service fees which were assessed against them.

In *Bacon*, the City of Huntington filed suit against the Bacons, who were owners of buildings located in the City. The Bacons refused to pay the municipal service fee. They maintained the fee was a tax which violated the Tax Limitation Amendment. The circuit court disagreed and concluded the fee was a user fee which was properly imposed pursuant to W.Va. Code § 8-13-13. This Court affirmed the circuit court.

The City also brought a declaratory judgment action against the Cabell County Board of Education, seeking to determine whether the fee could be recovered from the Board in light of *United States v. City of Huntington, W.Va., supra*. The question was certified to this Court, where it was determined that county boards of education are authorized to pay municipal service fees.

We note that the federal case, *United States v. City of Huntington, W.Va., supra*, was written prior to this Court's *Bacon* decision. The *Bacon* Court determined that municipal service fees are indeed fees and not taxes. The Bacons and the Board of Education were found to be subject to the fee even though the federal government was not obligated to pay pursuant to the Supremacy Clause, Article VI, Clause 2 of the U.S. Constitution. By way of explanation, this Court stated:

> [W]here a federal entity is involved, the federal courts may determine whether a particular funding mechanism employed by a state or its political subdivision is, in fact, a tax[.]
>
> It follows, therefore, that a state is not bound by a federal court's characterization of a state tax or fee when a federal right is not involved. After all, as we have previously stated, states are free to determine their own fiscal policy as long as the fiscal policy does not violate the Constitution of the United States (citation omitted).

*Bacon* at 464-65, 473 S.E.2d at 750-51. The Fourth Circuit's holding did not apply to the Bacons or the Board of Education. The same is true for the appellants in the case *sub judice.*

We reiterate this Court's previous holding which states:

> An ordinance which imposes a municipal service fee pursuant to *W.Va. Code,* 8-13-13 [1971] upon the owners of buildings at an annual rate plus a percentage based upon the square footage of space contained in each structure on the lot for the sole purpose of defraying the cost of fire and flood protection services is a user fee rather than a tax and therefore, is not in violation of the Tax Limitation Amendment found in *W. Va. Const.* Art. X, § 1.

Syllabus Point 6, *Bacon, supra.*

We also reiterate that:

> Pursuant to *W.Va. Code,* 18-5-9 [1933], a county board of education is authorized to pay a municipal service fee imposed by a municipality

> for fire and flood protection services pursuant to *W.Va. Code*, 8-13-13 [1971] in order to protect the health of its pupils and in order to keep its school grounds and buildings in good order.

Syllabus Point 8, *Bacon, supra.*

The circuit courts did not err in granting summary judgment in favor of the Cities of Clarksburg, Huntington, and Wheeling. Accordingly, we affirm the respective judgments of the Circuit Court of Harrison County, the Circuit Court of Cabell County, and the Circuit Court of Ohio County.

Affirmed.

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**No. 25143 –** *City of Clarksburg, a municipal corporation v. Grandeotto, Inc., a corporation; Bernard J. and Kathy A. Folio; Mid-City Land Co.; Bernard J. Folio dba Highrise Associates; Kathryn Folio; Joseph Folio.*

**No. 25401 –** *The City of Huntington, a West Virginia municipal corporation v. Most Reverend Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston.*

**No. 25402 –** *Wheeling College, Inc., a West Virginia corporation, and the Most Reverend Bernard W. Schmitt, Bishop of the Diocese of Wheeling-Charleston v. The City of Wheeling, a municipal corporaton AND The City of Wheeling, a municipal corporation v. The Ohio County Board of Education.*

MAYNARD, Justice, dissenting:

I dissent because I believe the Catholic Church, as well as all churches, and all public and other schools are exempt under W.Va. Code § 11-3-9 (1998) from paying this wolfish tax which is cloaked in the garb of a sheepish fee.[1]

First, I note the great importance of the municipal taxes at issue here. Government performs no more important service than providing its citizens with fire protection. This is a very basic and historical government service, and one that private citizens are unable to undertake for themselves. In order to provide this service, local governments must staff fire departments with trained personnel and provide these personnel with modern firefighting equipment. This requires a lot of money. This money is generated through the levying of taxes on those who reap the benefits of effective fire protection. This is at [sic] it should be.

However, Article X, § 1 of the Constitution of West Virginia provides, in part, that "property used for educational, literary, scientific, religious or charitable purposes . . . may by law be exempted from taxation." This constitutional authorization is codified by the Legislature in W.Va. Code § 11-3-9 (1998). Specifically, W.Va. Code § 11-3-9 provides, in pertinent part:

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[1] I dissent specifically to this Court's decisions in case numbers 25401 and 25402 involving the Roman Catholic Diocese, schools and boards of education. I believe there is no reason the appellants in case number 25143 should not pay the "fee" at issue since, unlike churches and schools, they are not exempted under W.Va. Code § 11-3-9.

> (a) All property, real and personal, described in this subsection, and to the extent herein limited, is exempt from taxation:
>
> (1) Property belonging to the United States, other than property permitted by the United States to be taxed under state law;
>
> (5) Property used exclusively for divine worship;
>
> (9) Property belonging to, or held in trust for, colleges, seminaries, academies and free schools, if used for educational, literary or scientific purposes, including books, apparatus, annuities and furniture[.]

This code section derives, at least in part, from the recognition that those enumerated institutions which are supported by the public, either through taxation or private gifts, and that exist for the educational, literary, scientific, religious, or charitable enrichment of society should fulfill their missions absent the burden of taxation. This is altogether fitting and proper. The majority, however, resorts to semantic sophistry in order to avoid the unambiguous language of W.Va. Code § 11-3-9. In short, the majority holds that a tax is not a tax when it is called a fee.

In holding that if a tax is called a "fee" it can be levied against those institutions lawfully exempt from taxation, the Court opens wide the door for unlimited government collection of so-called fees. Government's penchant for taxation depends on its ability to devise increasingly creative and expensive schemes to justify the need for the levying of additional taxes. It will not be

long now before legitimate "fees" for fire and flood protection are joined by more questionable "fees" such as recreation fees, clean air fees, pollution fees, beautification fees, road paving fees, garbage fees, cultural event fees, parking fees, sporting event fees, and regatta fees. Anyone doubting that such a proliferation of government "fees" could and will occur need only look at the history of taxation in the United States in the twentieth century to be convinced. Also, while the above-mentioned "fees" may be collected to pay for desirable things, these "fees" should be labeled what they really are: taxes.

"The power to tax involves the power to destroy," noted Chief Justice John Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 431, 4 L.Ed. 579 (1819). This is also true of the power to collect "fees." No matter what you call it, the money taken from the Catholic Diocese and the schools involved in this case means that there is less money in the operating budgets of these institutions. This is money that would otherwise be spent on teachers' salaries, new textbooks, equipment, or building improvements. In his oral argument before this Court, the lawyer for the Ohio County Board of Education and Wheeling Jesuit University contended that the board of education will be forced to pay almost one million dollars a year out of the school budget as a result of this "fee." This "fee," therefore, is really a tax paid by the school children in Ohio County to the detriment of their education. Regardless of whether the collection of the money is called a tax or a fee, it has the same effect on the appellants' finances. Shakespeare wrote, "That which we call a rose by any

other name would smell as sweet."[2] The Bard's words are equally true regarding the noxious odor of taxes. That which we call a tax by any other name smells just as bad.

In sum, I agree with the United States Court of Appeals, Fourth Circuit in *United States v. City of Huntington, West Virginia* in its assessment that the Huntington user fee "is a thinly disguised tax." 999 F.2d 71, 74. I believe this is true of all the fees involved here. Further, the Court of Appeals held that the federal government is immune from paying these exact same fees. Therefore, I would hold that if the federal government is immune from paying a "fee," the other entities listed in W.Va. Code § 11-3-9 are also. To say otherwise is a clear denial of equal protection to the churches and schools. Sadly, their recourse now must be to the federal courts to set things right. Accordingly, I would find that W.Va. Code § 11-3-9 exempts the Diocese and the schools from paying the "fees" at issue. This is clearly one instance in which the Diocese should not be bound to render unto Caesar. By holding to the contrary, the majority opinion opens the door to additional taxes and an increasing burden on those institutions that are, under our Constitution and by law, exempt from such taxation.

I am authorized to state that Justice McCuskey joins in this dissent.

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[2] *Romeo and Juliet*. Act II, Sc. 2, Line 43.

**IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA**

THE CITY OF HUNTINGTON,
a West Virginia Municipal
Corporation,

Plaintiff,

v. CIVIL ACTION NO. 97-C-320
(Judge David Pancake)

MOST REVERENT BERNARD W. SCHMITT,
BISHOP OF THE ROMAN CATHOLIC
DIOCESE OF WHEELING-CHARLESTON,

Defendant.

**ORDER**

CAME ON A PREVIOUS DAY, to-wit: Tuesday, May 19, 1998, the City of Huntington, by its counsel, Jendonnae L. Houdyschell, City Attorney, and the Defendant, Most Reverent Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston, by counsel, Sandra K. Henson and Michael A. Woelfel.

The Court, after review of the Memoranda filed by the parties and after hearing the arguments of counsel, does hereby find as follows:

**Collateral Estoppel**

1. Four conditions must be met in order for collateral estoppel to bar a claim. (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in

> privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *State v. Miller,* 194 W.Va. 3, 459 S.E.2d 114 (1995).

Upon reviewing the memoranda and arguments of counsel the Court finds that applying the above criteria collateral estoppel does not apply in this case. First of all, the same issues are not before this Court as were in the case styled *The City of Huntington v. SGM, Inc.*, et al., Civil Action No. 91-C-567. The *SGM* case concerned the City of Huntington's fire and flood fees, whereas the case at bar concerns the City of Huntington's Municipal Service Fee. Secondly, the parties to this action are not the same. This action is against the Most Reverent Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston. The previous action was against the St. Joseph Catholic Church and was handled by Reverend Moore. Therefore the Court finds that the parties are not the same. Based upon the foregoing, the Court holds that the City of Huntington may not assert collateral estoppel in the case before this Court.

**Equal Protection**

2. "[T]he constitutional requirement [for equal protection] is the seasonable attainment of a rough equality in . . . treatment [of] similarly situated property owners." *Alleghey-Pittsburgh Coal Co. v. Commission of Webster County,* 488 U.S. 336, 109 S.Ct. 633 (1989). Further, a statute classifying economic rights will withstand equal protection rational basis scrutiny where the classification bears

> a reasonable relationship to a proper governmental purpose and all persons with the class are treated the same. *Gibson v. West Virginia Department of Highways*, 185 W.Va. 214, 406 S.E.2d 440, 445.

The West Virginia Supreme Court in the case of *The City of Huntington v. Bacon, et al.*, 473 S.E.2d 743 (W.Va. 1996) has already determined that the City of Huntington's Municipal Service Fee reasonably serves the purpose for which it was enacted. *Id.*

The Municipal Service Fee is assessed on all owners of property within the City of Huntington save that owned by the federal government or by the City of Huntington. Specifically, Section 773.03 of the Codified Ordinances of the City of Huntington provides:

> "On or after July 1, 1991, there is hereby imposed upon all users of municipal services a municipal service fee for each lot or parcel of land containing any building or structure owned by each user. The fee shall be imposed at an annual rate of eighty ($80.00) dollars per lot plus $0.0575 per square foot of each building or structure existing on each such lot."

Further a "user" is defined in Section 773.02 of the Codified Ordinances of the City of Huntington as follows:

> "For the purposes of this article, "user of municipal services" and "user" refers to any person, firm, corporation or governmental entity of any kind owning any building or structure, whether residential, commercial, governmental or otherwise, within the limits of the City which benefits

from fire and/or flood protection services provided by the City."

The Defendant cites two examples of entities which do not pay a Municipal Service Fee to the City and, therefore, contend that they should not be required to pay the same.

The first entity the defendant refers to is the United States Federal Government. In the case of *United States of America v. City of Huntington*, 999 F.2d 71 (4th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1048, 127 L.Ed. 2d 371 (1994), the United States Court of Appeals for the Fourth Circuit held, "[t]he service fee is a thinly disguised tax, and, as such, the USPS and GSA are immune from liability for it." The reason that the Court held that the federal government was immune from liability was based upon the Supremacy Clause of the United States constitution. The Defendant herein is not entitled to the protections afforded by the Supremacy Clause nor has the Defendant's equal protection rights been violated by continuing to be charged for the same. The City of Huntington cannot legally collect this fee from a federal entity based upon this decision. This was not an exemption put in place by the City to give special treatment to the federal government, but was placed there by the Fourth Circuit Court of Appeals.

The second entity the defendant cites to is the City of Huntington. There is no dispute that the City of Huntington does not send itself separate and individual bills for each and every property it owns within the City of Huntington. On the other hand, the City contributes additional funds from the City's general revenue account

to cover the cost of providing these services which is not fully covered by the Municipal Service Fee. For example, in fiscal year 1996-1997, the City paid an additional $2,609,308.25 to cover the costs of providing fire and flood protection to the City of Huntington.

This Court finds that the City does not need to administratively bill itself for the properties it owns. The Court finds that the City, in billing itself would unnecessarily add to the City's administrative costs in collecting the same.

Further, the Court finds that the case of *Allegheny Pittsburgh Coal v. County Commission of Webster County,* 109 S.Ct. 633, 638 is not applicable regarding the issues in the case at bar.

Based upon the foregoing, the Court finds that there has been no violation of the equal protection clause or of the Defendant's other constitutional rights. Therefore, in accordance with Judge O'Hanlon's order entered July 21, 1997 and other cases that have been presented before this Court, the Court does hereby find that the Defendant in this action is liable to the City of Huntington for payment of its municipal service fees. Further, the Court does withhold judgment as to the monetary damages of municipal service fees until some point in the future, allowing parties time to calculate the same and present that evidence to the Court.

**Penalties**

3. On the issue of penalties, the Court does hereby find that the fact that the City of Huntington imposes penalty upon penalty

> has a chilling effect upon the litigation of these issues. Therefore, the Court finds for purposes of the case now before it that the penalties shall be computed only upon the outstanding principal amount of municipal service fees and not on any penalty that has previously accrued. It must be noted that the Court is not ordering that the City of Huntington's ordinance be changed by its findings in this case, nor the City's method of computing its penalty upon other entities be modified in accordance therewith.

WHEREFORE, based upon the foregoing, it is hereby ORDERED, ADJUDGED and DECREED that judgment on this issue of liability be GRANTED to the City of Huntington and that the Defendant's Motion for Summary Judgment is hereby DENIED.

ENTER THIS 4 DAY OF JUNE, 1998.

/s/ DAVID M. PANCAKE
Honorable David M. Pancake,
Judge

PREPARED FOR ENTRY BY:

/s/ Jendonnae L. Houdyschell
Jendonnae L. Houdyschell, Esquire
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APPROVED FOR ENTRY BY:

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**IN THE CIRCUIT COURT OF**
**CABELL COUNTY, WEST VIRGINIA**

THE CITY OF HUNTINGTON,
a West Virginia Municipal
Corporation,

Plaintiff,

v.

CIVIL ACTION NO. 97-C-320
(Judge David Pancake)

MOST REVERENT BERNARD W. SCHMITT,
BISHOP OF THE ROMAN CATHOLIC
DIOCESE OF WHEELING-CHARLESTON,

Defendant.

**ORDER**

CAME ON A PREVIOUS DAY, to-wit: Tuesday, May 19, 1998, the City of Huntington, by its counsel, Jendonnae L. Houdyschell, City Attorney, and the Defendant, Most Reverent Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston, by counsel, Sandra K. Henson and Michael A. Woelfel.

The Court, after review of the Memoranda filed by the parties and after hearing the arguments of counsel, does hereby find as follows:

1. With regard to Count I of the Complaint, the Court does hereby find that the Defendant is indebted to the City of Huntington in the amount of Eight Thousand Twenty-Three Dollars and 35/100 ($8,023.35); prejudgment interest from April 24, 1997 to the date of the entry of this Order on the amount of Six Thousand One Hundred Ninety-Nine Dollars and 87/100 ($6,199.87); post judgment

interest on the amount of Eight Thousand Twenty-Three Dollars and 35/100 ($8,023.35) in addition to all prejudgment interest awarded hereon.

2. With regard to Count II of the Complaint, the Court does hereby find that the Defendant is indebted to the City of Huntington in the amount of Ten Thousand Seven Hundred Twenty-Eight Dollars and 65/100 ($10,728.65); prejudgment interest from April 24, 1997 to the date of the entry of this Order on the amount of Eight Thousand Two Hundred Ninety Dollars and 32/100 ($8,290.32) post judgment interest on the amount of Ten Thousand Seven Hundred Twenty-Eight Dollars and 65/100 ($10,728.65) in addition to all prejudgment interest awarded hereon.

3. The Court further finds that the Defendant shall bear all costs associated with the filing of this action.

WHEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that with regard to Count I of the Complaint, the Court does hereby GRANT judgment in favor of the City of Huntington and against the Defendant and does hereby ORDER the Defendant to pay to the City of Huntington the amount of Eight Thousand Twenty-Three Dollars and 35/100 ($8,023.35); prejudgment interest from April 24, 1997 to the date of the entry of this Order on the amount of Six Thousand One Hundred Ninety-Nine Dollars and 87/100 ($6,199.87), post judgment interest on the amount of Eight Thousand Twenty-Three Dollars and 35/100 ($8,023.35) in addition to all prejudgment interest awarded hereon.

It is further ORDERED, ADJUDGED and DECREED that with regard to Count II of the Complaint, the Court does hereby GRANT judgment in favor of the City of Huntington and against the Defendant and does hereby ORDER the Defendant to pay to the City of Huntington the amount of Ten Thousand Seven Hundred Twenty-Eight Dollars and 65/100 ($10,728.65); prejudgment interest from April 24, 1997 to the date of the entry of this Order on the amount of Eight Thousand Two Hundred Ninety Dollars and 32/100 ($8,290.32); post judgment interest on the amount of Ten Thousand Seven Hundred Twenty-Eight Dollars and 65/100 ($10,728.65) in addition to all prejudgment interest awarded hereon.

It is further ORDERED, ADJUDGED and DECREED that the Defendant shall bear all costs associated with the filing of this action.

To all of which the Defendant does hereby object and except.

ENTER THIS 12 day of ~~MAY~~ June, 1998.

/S/ DAVID M. PANCAKE

Honorable
David M. Pancake, Judge

PREPARED FOR ENTRY BY:

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STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 28th day of January, 1999, the following order was made and entered:

City of Clarksburg, a municipal corporation, Plaintiff Below, Appellee

vs.) No. 25143

Grandeotto, Inc., a corporation; Bernard J. and Kathy A. Folio; Mid-City Land Co.; Bernard J. Folio, d/b/a Highrise Associates; Kathryn Folio; Joseph Folio, Defendants Below, Appellants

**AND**

The City of Huntington, a West Virginia municipal corporation, Plaintiff Below, Appellee

vs.) No. 25401

Most Reverend Bernard W. Schmitt, Bishop of the Roman Catholic Diocese of Wheeling-Charleston, Defendant Below, Appellant

**AND**

Wheeling College, Inc., West Virginia corporation, and the Most Reverend Bernard W. Schmitt, Bishop of the Diocese of Wheeling-Charleston, Plaintiffs Below, Appellants

vs.) No. 25402

The City of Wheeling, a municipal corporation, Defendant Below, Appellee

AND

The City of Wheeling, a municipal corporation, Plaintiff Below, Appellee

vs.

The Ohio County Board of Education,

Defendant Below, Appellant

The Court, having maturely considered the petition for rehearing and reargument filed by the appellants, Wheeling College, Inc., a West Virginia corporation, the Most Reverend Bernard W. Schmitt, Bishop of the Diocese of Wheeling-Charleston, and the Ohio County Board of Education, and the written response filed in opposition thereto, and the petition for rehearing and reargument filed by the appellants, Grandeotto, Inc., a corporation, Bernard J. and Kathy A. Folio, Mid-City Land Co., Bernard J. Folio, d/b/a Highrise Associates, Kathryn Folio, and Joseph Folio, in the above-captioned cases is of opinion to, and doth hereby, deny the petitions for rehearing. Justices Maynard and McGraw would grant.

A True Copy

Attest: /s/ Illegible
Clerk, Supreme Court of Appeals